

Local News

Rethinking the system



John Madill / H-P staff Court-appointed attorney Richard Sammis meets with a client on Friday in the hallway of the Berrien County Courthouse.

Changes sought in how poor are represented in court

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ST. JOSEPH - For nearly three decades, Richard Sammis has devoted a large part of his law practice to representing poor people facing criminal charges.

He is part of a group of eight lawyers who contract with Berrien County to provide indigent defense for hundreds of cases each year, a job that can sometimes be daunting.

The county's practice of providing flat payments to the lawyers through contracts, no matter the caseload, limits face-to-face time with clients.

"When you have 15 to 20 cases in one morning, they're not going to see a lot of you," said Sammis, who believes that some of the wave of criticism directed at the indigent defense system in Michigan is warranted.

"As a professional, you have in mind your client's best interests, but things are in opposition," he said. "A lot of us think that, eventually, public defender offices will take over this work."

That day may be approaching.

The method long used in the state to provide defense for people who cannot afford lawyers is under attack. Various organizations charge that the Legislature and governor are shirking their responsibility to pay for and operate a system that works.

A class action lawsuit filed by the American Civil Liberties Union alleges that the state has failed to provide money, guidance and oversight for indigent defense.

By default, the suit alleges, the obligation falls on counties, and they are unable to deliver legal representation that passes constitutional muster.

A bill introduced in the Michigan House in December would create a state-run public defender system to enforce minimum standards. The funding system is to be identified in a subsequent bill.

Seeking reform

The 2007 civil rights suit filed by the ACLU in Ingham County alleges that indigent defendants in criminal cases in Berrien, Genesee and Muskegon counties did not receive constitutionally adequate counsel from their court-appointed lawyers.

The eight plaintiffs in the case claim that their lawyers spent little time with them, did not discuss cases before negotiating plea agreements and otherwise failed to look out for their best interests.

As a result, people were wrongfully convicted, served excessive jail time before trial, pleaded guilty to inappropriate charges and were denied trial when defenses were available, the suit contends.

Jessie Rossman, a staff attorney with ACLU in Michigan, said the state is one of the few in the country where indigent defense funding, lawyer training and oversight are left to counties.

The state is failing to provide effective assistance of competent counsel, she said, which means lawyers capable of putting prosecution cases to the "crucible of meaningful adversarial testing."

Often, she said, the system puts the defense at a disadvantage from the start.

For example, prosecutor's offices are generally well-funded and have police to investigate crimes, creating an imbalance compared to the resources committed to indigent defense.

Indigent defense lawyers may not have the time to investigate a case or the money to hire someone to do the work.

"It's like fighting with one hand tied behind your back," Rossman said.

According to a study by the National Advisory Commission on Criminal Justice Standards and Goals, a full-time indigent defense lawyer in one year can capably handle no more than 150 felony cases, 400 misdemeanors or 200 juvenile delinquency cases.

Contract holders in Berrien County have a heavier caseload. In 2004, six indigent defense lawyers handled 4,479 felony and misdemeanor cases, an average of 746 each. One lawyer regularly handled more than 1,000 cases a year, in addition to a private practice, the suit alleges.

The ACLU suit names as defendants the state and Gov. Jennifer Granholm, but no counties.

Terse counsel

One of the plaintiffs, Christopher Duncan of Benton Township, claims that his contact with his lawyer was for less than five minutes in a holding cell below the courtroom with other people present.

Duncan alleged that his lawyer advised him to waive a preliminary hearing and plead guilty as charged in 2007 to breaking and entering. His lawyer did not ask him whether he wanted to pursue a plea, the suit contends, but plea-bargained with the prosecutor without Duncan's knowledge.

Another Berrien County plaintiff, Billy Joe Burr Jr. of Niles, alleged that his court-appointed lawyer also entered into plea negotiations without his knowledge. Burr was charged with stealing a car, and though he believed he had a solid defense, the lawyer did not investigate and terminated their first meeting when Burr refused to plead guilty as charged, according to the suit.

The plaintiffs are asking the court to declare that the state and governor have violated their constitutional rights and to prohibit such actions in the future. The complaint does not suggest what steps the state should take to comply.

According to the ACLU, reports written by task forces and committees dating back to the 1970s have pointed out glaring deficiencies in the state's indigent defense system. All recommended creation of a statewide indigent defense commission but the Legislature has not acted.

The state is attempting to have the suit dismissed through a pre-trial motion for summary disposition, claiming governmental immunity. An Ingham Circuit Court judge denied the motion, a decision upheld by the state Court of Appeals in a 2-1 decision in June. In December, the Michigan Supreme Court granted leave to appeal and will hear oral arguments in April.

Passing the buck

Laura Sager, executive director of the Campaign for Justice, a group working to change the indigent defense system, said the pending House bill would go far to solve problems. The campaign is a nonpartisan coalition of more than 50 organizations.

"The legislation focuses on principles for an effective system, workload controls, training and other areas," she said.

The bill would create a public defense system within the judicial branch of government. A nine-member commission would oversee an office of public defense with a staff of lawyers.

Services would be provided by staff attorneys, through contracts with lawyers and by assigned counsel.

Sager said the state has pushed its responsibility onto counties with no direct funding. Counties handle the

requirements as best they can, she said.

"No matter how ethical an attorney may try to be, the only way he can make a living is by moving cases," Sager said.

A 2008 report, "A Race to the Bottom," ranked Michigan 44th of the 50 states in per capita spending on indigent defense. Michigan counties spent just over \$74.4 million in one recent year, \$7.35 per capita and 38 percent below the national average.

The study conducted by the National Legal Aid & Defender Association analyzed how government cost-cutting and speedy case handling have hurt the constitutional right to counsel.

In Ottawa County, the study said, the emphasis on case processing led the jurisdiction to refer to the day of district court arraignment as "McJustice Day."

"You have a statewide problem in which the quality of justice varies from court to court," Sager said. The push to improve indigent defense is going on in other states. Louisiana made sweeping changes after Hurricane Katrina, Montana overhauled its system and New York is considering changes.

"We were the first state to provide (indigent) counsel," Sager said. "But it never modernized its system."

Defending the system

R. McKinley Elliott, Berrien County corporate counsel, said the push for change is more about political ideology than providing better criminal defense for indigents.

"No matter how you dress it up, the underlying theory is that the only way to get a good lawyer is to get one paid for by a state agency," Elliott said. "This would entail creation of a whole department with managers and all the bureaucratic bulge and bloat that comes with it."

The expense of running such an operation would take money away from the work of defending indigent people, he said.

Lawyers who contract with the county are among the most experienced in the region, Elliott said. A state-run public defender office would give no consideration to experience gained in private practice or working in a prosecutor's office, he said.

"It's a lawsuit where someone first arrived at the conclusion and then backtracked to the question," Elliott said.

Berrien Prosecutor Arthur Cotter said the lawyers doing indigent work do a good job overall.

"In most cases the key is making sure the defendant gets a fair shot, a trial or hearing if he wants it," Cotter said. "They know where the mind of the prosecutor is on standard pleas."

But the lawyers are not miracle workers and some of the people they defend are guilty, he said.

Changes being made

The county is addressing some of the criticisms as new indigent defense contracts are negotiated, said Berrien Trial Court Chief Judge Alfred Butzbaugh. New contracts require lawyers to keep written records of services performed, including a record of the number of proceedings handled.

Lawyers are required to follow through on cases from start to finish. That includes meeting privately with clients after arraignment to explain charges, listen to the client's explanation, inform the client about sentencing and options in the proceeding and answer questions.

Other actions are required at each step of the process and lawyers are also required to participate in an annual evaluation at the court's request.

To address the large caseload problem, the court set a maximum of 30 felony cases for each lawyer during the cases' most critical stages.

"We've tried to set up standards in the contracts," Butzbaugh said.

The court has also set aside money for indigent attorneys to use to hire investigators. A program being developed would have students at the Cooley Law School campus in Grand Rapids assist indigent defense lawyers in legal research and other matters.

The trial court budget is about \$21 million this year and of that amount, indigent defense accounts for \$1.2 million. Services are provided by about 29 lawyers who work in groups, primarily through six multi-year contracts, said court Administrator Brian Ray.

Berrien is one of about 40 Michigan counties that contract with lawyers for indigent defense services.

Felony Defense Counsel, the group that includes Sammis, is being paid \$465,000 this year to handle indigent defense for all misdemeanor and felony cases that come through the county Courthouse in St. Joseph.

Contracts with other groups of lawyers or law firms provide indigent services for misdemeanor and felony cases in Niles, Drug Court, and three different types of service in the court's Family Division.

The county also paid \$99,000 last year to provide indigent defense lawyers in felony appeals cases, and \$24,000 for appeals of family court decisions.

The state provides money for court operations, including about \$1 million a year from the court equity fund, but nothing specifically for indigent defense. The state does pay for most of judges' salaries and covers large portions of the cost of out-of-home placement for juveniles, and friend of the court child support collection efforts.

Attorney Sammis said the changes have made his job harder, especially working within the court's busy schedule.

"So far, I can't argue with any of the requirements the court is making," he said. "They are reasonable."

The biggest issue attorneys have remains the flat pay rate without regard for the number of cases, said Sammis, who has done indigent defense work since 1982.

"I don't know if there is one solution that works for every county," he said. "Public defenders may not work in smaller counties but it's worth looking in to."

Sammis said there's a "huge difference" between the retained lawyer, who may have a whole morning to spend with a client, and a court-appointed lawyer who doesn't have that luxury.

Clients sometimes perceive that as a lack of caring, Sammis said, though they may not know that the lawyer has gotten all the information needed.

"Defendants have a lot of questions, they want a lot of information that's not pertinent. But it's what people generally want from their lawyer," he said.

Another problem is that indigent clients may put low value on a lawyer's advice and services.

"We do communicate in holding cells. You advise them, then they turn and ask the other people in the cell what they think, and they listen to those people," Sammis said.

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